United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1398

To be argued by
GRETCHEN WHITE OBERMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 73-1398

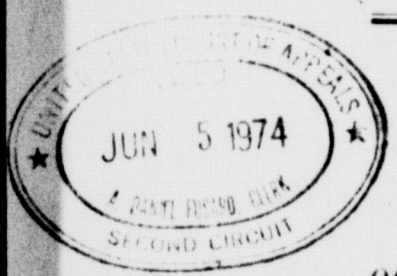
UNITED STATES OF AMERICA,
Appellee,

—against—

CARMINE TRAMUNTI,
Defendant-Appellant,

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT



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APPELLANT'S REPLY BRIEF

I. ANSWERING RESPONDENT'S POINT I

(a) Defense Objections To The Use of The 1966 Grand Jury Minutes Should Have Been Sustained On Evidentiary Grounds.

When the prosecutor began questioning appellant as to the so-called background facts, defense objection on the ground that the inquiry was collateral was overruled, the court holding that it had discretion to permit the inquiry. (68a) Defense counsel continued to object to the "background" questioning on the additional ground that the inquiry covered a period remote in time (see 72a), and also reiterated his previous objection, stating that

the inquiry was "remote to the issues on trial." (76a) The trial court ruled it had discretion to allow the inquiry (76a). Counsel further objected on the ground that on collateral matters, the prosecutor was bound by the witness' answer and could not use the grand jury transcript to suggest the existence of extrinsic proof. (82a) Once again, the objection was overruled. (83a)

The Government has observed that no argument was made on appeal as to the validity of these objections. (br. 8) Upon reflection, we believe that the objections were well taken, and that the court below erred in overruling them.

The Government contends that the evidence was relevant to impeach appellant's credibility and as evidence of prior similar acts to establish knowledge and intent. (Br. 7) We submit that the evidence was improperly admitted for each of these purposes.

In a long line of cases, this court has held that "a witness' acts of misconduct are not admissible to impeach his credibility unless the acts resulted in the obtaining of a conviction." U. S. v. Sposato, 446 F.2d 779, 780 (2d Cir. 1971); U. S. v. Semensohn, 421

F.2d 1206, 1208 (2d Cir. 1970); U. S. v. Bowe, 360 F.2d 1, 14-15 (2d Cir. 1965) cert. den. 385 U.S. 961 (1966). Extrinsic evidence of such acts of misconduct for the purpose of attacking credibility is also not permitted. U. S. v. Haggett, 438 F.2d 396, 399 (2d Cir. 1971). Under the applicable case law, the trial court erred in overruling the defense objection and permitting the Government to impeach the appellant's credibility with extrinsic evidence of acts not resulting in convictions.

We further submit that the trial court erred in permitting the inquiry on the two other grounds stated in the defense objections: that the evidence was remote to the issues on trial* and that it was remote in time.

Where prior crimes evidence is too remote in time, it has no probative value on the issue of knowledge or intent. Lloyd v. U. S., 222 F.2d 9, 18 (5th Cir. 1955). The same is true where the prior and present acts are "in no way connected in point of circumstances" and hence

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*The Government virtually concedes this in its brief, when it states that the evidence had no bearing on any of the factual questions in dispute in the case. (Br. 7-8)

the prior act is not relevant to prove or disprove a defendant's intent or knowledge in connection with his performance of the acts charged in the indictment. Wolcher v. U. S., 200 F.2d 493, 497-8 (9th Cir. 1952). The evidence in question was vulnerable on both grounds, hence the trial court erred in overruling the defense objections.

No claim has ever been made that receipt of the evidence, if improper, could be disregarded as harmless error. Moreover, since "the prejudicial effect of such material is notorious" (Thurman v. U. S., 316 F.2d 205, 206 (9th Cir. 1963); U. S. v. Guglielmini, 384 F.2d 602, 606 (2d Cir. 1967)), it cannot be said that the error did not influence the jury. Kotteakos v. U. S., 328 U.S. 750 (1946).

(b) The Immunity Issue.

(1) The Government Used the Immunized Testimony As Affirmative Evidence of Guilt.

The Government has never contended that its use of the compelled grand jury testimony was in response either to any testimony by appellant or to any action

which could be characterized as opening the door.

The Government has acknowledged throughout that it used the evidence not only to impeach credibility, but as affirmative evidence of "prior similar acts to establish that Tramunti acted with guilty knowledge and intent..." (Br. 7) This was the argument made to the jury in summation (136a-137a; 145a-146a) and which was made to the court below when the Rule 33 motion was argued.*

The Government is thus asking this court to authorize the use of the immunized testimony not only defensively (as was permitted in analogous situations in Walder (347 U.S. 62) and Harris (401 U.S. 222)), but affirmatively, as evidence of guilt upon an element of the crime charged, which no case dealing with the use of illegally obtained evidence has permitted.

The Government is not limited to introducting prior crimes evidence in rebuttal, but can offer it on its case in chief, whether or not the defendant takes the

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*The Government stated that the issue was submitted to the jury as a prior similar act--that this was how the evidence was handled on cross-examination and in summation. (Min. of Jan. 30, 1974, p. 18)

stand, where intent, etc. are placed in issue by the nature of the facts sought to be raised by the prosecution. U. S. v. Brettholz, 485 F.2d 483 (2d Cir., 1973). By asking this court to sanction the use of immunized testimony for this purpose, the Government is not only asking the court to sanction a further use of the testimony in addition to the two limited uses designated in Section 1406, and to sanction a use of the testimony not justified under the Walder - Harris reasoning, but to sanction the use of testimony compelled from a defendant under a grant of immunity for the purpose of providing direct evidence of his guilt. To sanction such use of immunized testimony would be to convert the immunity protection from one co-extensive with the Fifth Amendment, to one which merely pays lip service to the prohibition against self-incrimination while permitting the prosecution "by coercion /to/ prove a charge against an accused out ofhis own mouth." Malloy v. Hogan, 378 U.S. 1, 8 (1964).

(2) The Glickstein Exception Applies Only to Use of Immunized Testimony in Prosecutions For Offesnes Committed While Testifying.

Respondent's entire argument is premised on the supposition that since the Supreme Court permitted the use of immunized testimony in a perjury prosecution in the Glickstein case (222 U.S. 139) though there was no express right to prosecute for perjury contained in the statute*, ergo false immunized testimony can be used in any criminal prosecution and not just in the two designated prosecutions specified in Section 1406. No authority for this argument is cited except Glickstein and Bryan**.

In Application of Senate Select Committee, 361 F.Supp. 1282 (D.C., 1973), Chief Judge Sirica had

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* And used Glickstein as the authority for the Bryan decision (339 U.S. 323), even though the Bryan case presented no Fifth Amendment issue.

** The Pappaddio language (235 F.Supp. at 890) is quoted out of context (Br. 32) as the issue in that case was whether inclusion of the Glickstein exception in Section 1406 rendered the statute unconstitutional, since false testimony given under a grant of immunity could be used in a prosecution for perjury committed while testifying. The court held that the perjury prosecution exception was permissible since its inclusion insured that a witness could not escape punishment for perjury if he testified falsely after being granted immunity.

occasion to interpret the same exceptions enacted into Section 6002 of Title 18, and held:

> "Congress, as evidenced in the legislative history of §6001 et.seq., was well aware of the limitations which must be imposed on the use of compelled testimony to make immunity co-extensive with the Fifth Amendment privilege. The case authority extant at the time made it clear that testimony could not constitutionally be compelled if it were subject to use, direct or indirect, in support of criminal charges against the witness. It is inconceivable that Congress, in its specific attempt to devise a constitutionally sound use immunity statute, should have intended or permitted exceptions to the use of compelled testimony other than the obvious ones for offenses committed in the course of testimony." 361 F.Supp. at 1281

The court's citation of the legislative history is also illumenating:

> "The House Report referred to the exceptions proviso as 'probably unnecessary,' in other words, the liability of a witness for offenses committed while testifying (or refusing to comply with the order) is probably obvious without any specific exception in the statute. The statement of exceptions was not intended to go beyond the apparent, but was included simply as a matter of caution. /H.R.Rep.No. 91-1549, 91st Congress, 2nd Session (Sept. 30, 1970) at 42./
>
> "Note also the Justice Department's comments at hearings on the immunity bill: 'An exception of course is made for criminal

> offenses committed during the testimony, such as perjury and false statement and for failure to comply with the order itself.' /Hearings on S. 30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Congress, 2nd Session, (June 10, 1970) at 162./" Ibid at n. 5.

The only exception to a grant of immunity is that the witness can be prosecuted for criminal offenses, including perjury, committed while testifying and the immunized testimony used in such prosecutions.

Section 6002 was enacted in order to bestow only that degree of immunity required by the Fifth Amendment. See Sen.Rep. 91-617, pp. 51-56, 91st Congress (1969). If the Government is correct in arguing that Glickstein did hold that a witness testifying falsely under a grant of immunity gains no Fifth Amendment protection against use of the false testimony in all other proceedings, it is inconceivable that Congress, the Justice Department and the courts were so unaware of this that each continues to construe the Glickstein exception in precisely the same way we do.*

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* In the legislative history to §6002, it is clear that Congress intended to insure receipt of truthful testimony under a grant of immunity not by permitting use of false immunized testimony in all criminal proceedings, but by abolishing the two witness rule in perjury prosecutions to make such prosecution a more effective sanction. See Senate Report 91-617, supra, at pp. 57-59.

The Winter case (348 F.2d 204) cited by the Government further supports our reading of the limited scope of the Glickstein exception. Winter was prosecuted for perjury in the giving of non-immunized grand jury testimony. In upholding the perjury prosecution over a claim that the defendant was not told of his right to counsel prior to being sworn as a witness, the court carefully distinguishes the perjury prosecution from other uses of the testimony. The court assumes that if testimony were wrongfully compelled from a grand jury witness in violation of his right to counsel, then such testimony could not be used to secure his indictment or conviction for other crimes. 348 F.2d at 208.

The Government also miscontrues the holding in U. S. v. Kahan, 94 S.Ct. 1179. Kahan did not hold (as the Government states at Br. 23) that "statements, even when otherwise 'compelled' in order to exercise constitutional rights, are not entitled to Fifth Amendment protection" if false. The Kahan statements were not compelled, but were voluntarily made in Fifth Amendment terms, in the same way that the disclosures in the

Shotwell Mfg. Co. case (371 U.S. 341) were deemed voluntary. The question in Kahan was whether non-compelled false disclosures should be excluded because they were made to assert, falsely, a Sixth Amendment claim--a totally different question than exists in this case.*

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*The only basis for excluding voluntary admissions of a defendant is that contained in Simmons v. U. S., 390 U.S. 377 (1968). The Simmons majority held that there is no Fifth Amendment violation where testimony is voluntarily given to secure a benefit. 390 U.S. at 393-94 (Compare Justice Black's dissenting opinion, 390 U.S. at 397-98) However, the court in Simmons believed that even though the testimony may not be involuntary in Fifth Amendment terms, a defendant should not be forced to exercise his Fourth Amendment rights only at the risk of loosing his rights under the Fifth Amendment. Such a Hobson's choice could not, therefore, constitute a Fifth Amendment waiver. See also Fay v. Noia, 372 U.S. 391, 439-40 (1963).

This reasoning was subsequently rejected in Brady v. U. S., 397 U.S. 742 (1970); McMann v. Richardson, 397 U. S. 759 (1970) and Parker v. No. Carolina, 397 U.S. 790 (1970), and the court in McGautha v. California, 402 U.S. 183, 212 (1971) stated unequivocally that "the validity of /the Simmons/ reasoning must now be regarded as open to question..."

The Kahan case is merely a reiteration of the Shotwell principle, that one making a voluntarily false disclosure in response to inducements not constituting coercion in the Fifth Amendment sense, has no basis for complaint when the non-compelled disclosure is used to incriminate him. There is nothing in Kahan to support the Government's contention that compelled disclosures from one who has interposed a valid Fifth Amendment claim and which were obtained by the promise of immunity and the coercion of a threat of civil contempt (see Sen. Report 91-617, supra, at p. 57) can be used against the person so compelled without violating his Fifth Amendment rights.

The Fifth Amendment privilege against self-incrimination has always stood "in uneasy opposition to the principle that 'the public has a right to every man's evidence'." Dixon, "Federal Immunity Statutes" 22 G. Wash. L. Rev. 447, 448 (1954).

The immunity grant is the imperfect compromise, which seeks to obtain whatever information a non-cooperating witness will give without totally abrogating his Fifth Amendment privilege. It does not succeed perfectly in either objective. When testimony is secured

by coercion, the Government assumes the risk that the immunity bargain may prove worthless because forced testimony is never as complete, as candid and as truthful as is freely volunteered information. The witness granted immunity is substantially worse off than he would have been if permitted to remain silent. He is now subject to criminal sanctions for crimes committed while so testifying despite the grant of immunity. Had he been permitted to remain silent, then no such sanctions would have ensued. Since criminal sanctions already exist to qualify the Fifth Amendment privilege of one who is compelled to testify under a grant of immunity if he testifies falsely, there is no reason to allow further erosion of the already diminished Fifth Amendment privilege by also sanctioning the use of the compelled false testimony in any criminal proceeding as affirmative evidence of guilt.

(3) The 1966 Grand Jury Testimony Was Not Subject to Discovery Under Rule 16.

Without disputing its obligation to maintain grand jury minutes so that their immunized nature is readily apparent to all assistants having access to them under Rule 6(e) FRCr.P, and acknowledging that "the Government might have probed more exhaustively in advance into whether Tramunti's 1966 testimony had been given only after the granting of an immunity order by a District Court" (Br. 35), the Respondent, nevertheless, continues to assert that defense counsel must be faulted for failing to discern that which the prosecutor failed to discover--that the testimony was immunized.

The Government states that if counsel had moved for production of "all of defendant's Rule 16 statement..." (Br. 36) then he would have gotten the 1966 transcript. However, no case authority is forthcoming to support the rather astounding assertion that the 1966 minutes not resulting in the indictment on which the defendant was tried and not related "to any of the factual questions in dispute in the case," (Br. 8) were discoverable under Rule 16. The only relevant case we have found holds

precisely the opposite--that where no indictment was returned against a defendant as a result of the grand jury proceeding, then the defendant will not be allowed to inspect his grand jury statements. U. S. v. Sclafani, 126 F.Supp. 654 (EDNY 1954).

Moreover, Rule 16 is intended to give the defendant access to statements he made in connection with the pending prosecution. It is inconceivable that it can be read as enabling the defendant to discover any statement he may have made in the past in connection with other unrelated cases --on the theory that such statements may prove useful to him if he decides to take the stand, as discovery of them would permit him to tailor his testimony to make it consistent with his prior statements.* Even the most avid proponents of liberalized discovery have never asserted that it should extend not only to the minutes of the grand jury proceedings upon

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*If the court wishes to construe Rule 16 in this fashion, it will be a bonanza to the defense bar as it will require the prosecution to search through all its files to discover whether the defendant made any statements at anytime in the past, whether or not they have a direct relationship to the crimes charged.

which the defendant was indicted, but also to permit fishing expeditious into the files of unrelated proceedings in order to ward off potentially unpleasant cross-examination. See for example Comment, 38 Ford. L.Rev. 307 (1970).

(4) Indiviglio Does Not Apply to a Case Where Defense Counsel Was Unaware of the Facts Upon Which to Base an Objection.

In two cases cited by Respondent in addition to Indiviglio, it is clear from the opinions that defense counsel knew of the facts underlying the legal claim and declined to pursue them.

In Wright (466 F.2d 1256, 1259) the Court observes:

> "The failure to press these claims in the district court is all the more striking since Wright did not overlook the possibility that the search warrant might be subject to attack on the basis of a wiretap. Wright specifically reserved his right to raise the basis issue pending discovery of information concerning wiretaps, but after receiving it failed to move to suppress."

In Manning (448 F.2d 992, 1000) defense counsel questioned the agent at the suppression hearing as to

whether he announced his purpose and authority, but failed to raise this point as a basis for challenging the search and seizure in the district court.

There is no warrant in precedent or logic for extending Indiviglio to encompass a situation where the Government used evidence in its exclusive possession and control without first determining whether it had a legal right to do so, simply because defense counsel, who had no knowledge of the facts upon which to base an objection*, did not object on the unknown ground.

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*The district court did not impute any knowledge which the defendant may have had to defense counsel. As we have argued (App. Br. pp. 22, f.n.) the Court of Appeals for the Seventh Circuit considered this question in a comprehensive opinion and concluded that the prosecution cannot fulfill its obligations to disclose by giving the facts to the defendant and hoping he has the legal acumen to recognize their significance and convey them to his attorney.

II. ANSWERING RESPONDENT'S POINT II

We agree with the Government's statement that collateral estoppel occurs when it can be said that "if the factual issue was resolved in one way the Government almost certainly would win; if it was resolved the other way, the defendant almost certainly would win, for it was the crucial issue in conflict or directly controlled by such issue." (Br. 47f.n.) In this case if the factual issues of whether appellant was present at the Gatsby meeting and knew the co-conspirators had been resolved in favor of the Government, then the verdict would have been 'guilty', not 'not guilty.' Since these issues were resolved in the appellant's favor by the verdict, the collateral estoppel plea should have been sustained.*

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*The statement in U.S. v. Williams, 341 U.S. 58 which we relied on in our brief at p. 46 and which Respondent could not locate in the Williams opinion (Br. 46, fn) can be found at 341 U.S. at 63-64, including fn. 3, which specifically approves the rule that "an acquittal on facts essential to conviction on the subsequent charge bars a later prosecution."

III. ANSWERING RESPONDENT'S POINTS III AND IV

We believe that the issues have been fairly joined and rest upon the arguments made in our main brief.

IV. ANSWERING RESPONDENT'S POINT V

The Government treats our Point V as if the record shows that the prosecutor vouched for the credibility of its witness only in response to defense attacks on their credibility. This is not the way the issue developed at trial. The Government brought out on direct examination that it had a contract with the witnesses whereby they were obligated to tell the truth.* Once the Government took the offensive and injected its belief in the veracity of its witnesses into a trial on its direct case then any attempts by defense counsel on cross-examination to show these witnesses to be self-confessed liars and perjurers was fair response.

We would also call the court's attention to U. S. v. Winter, supra, 348 F.2d at 210, which observes

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*The sequence in which the testimony came in is set out in Appellant's Appendix at 238a-258a.

that there is no duty upon any prosecutor to admonish a witness to testify truthfully:

> "Once a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely, to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it."

Since no such admonition is necessary once the witness is sworn, it seems apparent that the only purpose such a provision can have in an immunity agreement with a witness is to attempt, improperly, to dispell the inferences of bias which invariably flow from the fact that a witness has agreed to give evidence in return for favored treatment for himself.

CONCLUSION

THE JUDGMENT APPEALED FROM MUST BE REVERSED.

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